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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

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# No. 614

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VALLEY WASTE MILLS,

*Petitioner,*

*vs.*

W. E. PAGE, JR., AND FIRST NATIONAL BANK OF ATLANTA, EXECUTORS OF THE ESTATE OF W. E. PAGE.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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## PETITION FOR WRIT OF CERTIORARI.

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The above named petitioner respectfully prays that writ of certiorari be granted to review and reverse a judgment of the Circuit Court of Appeals of the Fifth Circuit wherein petitioner was appellant and respondents were appellees, being case No. 9555 in the said United States Circuit Court of Appeals for the Fifth Circuit, which judgment affirmed a judgment of the District Court of the United States for the Middle District of Georgia, adverse to petitioner. The judgment of the Circuit Court of Appeals was rendered November 5, 1940. Petitioner files herewith ten copies of the record as printed in the court below, together with the proceedings and opinion in that court.

## Summary Statement of Matter Involved.

In the District Court petitioner instituted this suit against the executors of the deceased collector of Internal Revenue of the United States for the District of Georgia, to collect a certain amount alleged to have been an over payment of income taxes for the year 1933. The case was submitted to the District Court on an agreed statement of facts, without the intervention of a jury. The District Judge entered a judgment denying a recovery. This judgment has been affirmed by the Circuit Court of Appeals of the Fifth Circuit.

Under the agreed statement of facts the case turned entirely on whether petitioner received taxable income as a result of certain transactions in the year 1933. If these transactions resulted in taxable income petitioner was not entitled to recover. If they did not result in taxable income petitioner was entitled to recover the amount involved in the suit.

The several transactions are all of the same nature and involve transactions on the cotton exchanges known in the trade as "switching" transactions. The facts and circumstances are as follows:

At the commencement of the year 1933 petitioner held contracts for the purchase by it of a certain amount of cotton of a certain grade for future delivery. In the language of the trade petitioner was "long" this amount of cotton. At the commencement of that year petitioner's board of directors passed a resolution directing that its officers maintain its "long" position in the cotton market to this extent. This is important because it is a material factor in dealing with the legal problems arising in this case that the simultaneous purchases and sales that thereafter occurred were each and all pursuant to a definite

predetermined plan to maintain and not to change the position of petitioner in the cotton market.

Under the rules of the New York and New Orleans cotton exchanges all contracts for the future purchase of cotton mature within twelve months and cannot technically be extended. A practice has developed on these exchanges, however, to effect the same result by simultaneously selling the cotton called for in a maturing contract and entering into another contract at the same time for the purchase of an equal number of bales of cotton of the same grade to be delivered at a later date. As the Circuit Court of Appeals in its judgment points out this in the trade is spoken of as "buying a contract" and "selling a contract", but actually the customer is himself a party to the contract. He does not buy a contract but makes a contract. He sells cotton and at the same time buys the same grade of cotton in the same amount for a later delivery. His position from an economic standpoint remains wholly unchanged.

In calculating the tax against petitioner the Commissioner of Internal Revenue treated the two elements entering into each "switching" transaction—that is—the sale of one lot of cotton and the purchase of an equal lot of cotton, as wholly separate and distinct transactions and charged the petitioner with taxable gains on each such sale. Petitioner's contention was and is that as the purchase and sale were made simultaneously, pursuant to a predetermined plan to maintain petitioner's position unaltered, the switching transaction should be regarded as producing neither gain nor loss, but that the determination of gain or loss should be made when each lot of cotton was finally closed out and petitioner's market position thus altered.

**Jurisdiction.**

The Court has jurisdiction to issue the writ of certiorari to review the decision of the United States Circuit of Ap-

peals for the Fifth Circuit herein under Section 270 of the Judicial Code as amended by the Acts of February 13, 1925 (Title 28, U. S. C. A. Section 347).

**The Questions Presented.**

As above indicated the question here presented is whether the simultaneous sale and purchase of cotton under the circumstances above stated, when made pursuant to the predetermined plan above stated, should be regarded as effecting a taxable gain or loss on the particular sales; or whether on the contrary the Court should consider such switching transactions as effecting neither gain nor loss, but merely preserving the taxpayer's economic status exactly as it had been pursuant to the predetermined plan to maintain such status.

The question may be stated a little differently as follows:

Where there is a purchase and sale of a certain commodity made simultaneously pursuant to a predetermined plan to maintain the taxpayer's position unaltered with respect to that commodity, does taxable gain or loss arise?

It may be stated fundamentally in still a different way: Where a commodity is bought and sold simultaneously in the same amount and of the same grade pursuant to a predetermined plan to maintain the taxpayer's position unaltered, and where the transactions thus had do in fact carry out the plan and maintain the taxpayer's economic position substantially unaltered, will the Court, in applying the tax laws of the United States be governed by the substance of the matter as thus disclosed, or on the other hand, will it disregard the substance and determine the question of gain or loss narrowly from the technical form which the transactions took? Attention should here be directed to the fact that the technical form of these particular transactions was due, not to a preference on the

part of the taxpayer to follow these forms, but to the fortuitous circumstance that it was the form for such transactions provided by the exchanges involved.

**Specification of Errors Complained of.**

The decision of the Circuit Court of Appeals presents the following basic errors which are herein specified:

1. The Circuit Court of Appeals erred in holding that where a commodity is sold and contemporaneously an equal amount of the same commodity of the same grade is purchased pursuant to a predetermined plan to retain the same economic position, the sale would be treated as a closed transaction, realizing gain or loss to the taxpayer, and the purchase would be treated as commencing a new transaction.

2. The Circuit Court of Appeals erred in treating the tax liability of a taxpayer, growing out of situations of the kind just described, as being controlled by the form in which the transactions happened to be cast, rather than by the economic realities of the situation.

**Reasons Relied On for the Allowance of the Writ.**

It is respectfully submitted that the writ should be granted for the following reasons:

1. It is a matter of general importance as to how the tax laws of the United States should be applied in such a situation. The purchase and sale of commodities simultaneously for the purpose of maintaining an unaltered position in the market is something that must have occurred with substantial frequency in this country. Frequently, also, this will be the result of a predetermined plan to maintain an unaltered economic position on the part of the taxpayer. It is a matter of great public importance to settle definitely

the taxable effect of such transactions. It should in this connection be borne in mind that the plan applied to this taxpayer may in many instances have the effect of reducing a tax liability instead of increasing it. It so happens that in the present matter the plan followed by the Commissioner of Internal Revenue increased the tax liability of this taxpayer; but if the forms of such transactions are to govern the question of gains, they will equally control the question of losses, and in the long run such a rule would reduce the tax revenue of the Government as frequently as it would increase it. It is, however, a matter of general public importance that the matter should be settled definitely and finally by this Court. While we believe that the principles which should apply have been definitely settled by this Court, and that the decision of the Circuit Court of Appeals is in conflict with these decisions, nevertheless, there is, on the facts, no decision of this Court specifically controlling.

2. The decision of the United States Circuit Court of Appeals is in conflict with repeated rulings of this Court that in tax matters substance and not form should prevail. The decision is in principle in conflict with applicable decisions of this Court in this respect, particularly the following:

*Pearson* v. *McGraw*, 308 U. S. 313;
*Helvering* v. *Clifford*, 309 U. S. 331;
*Higgins* v. *Smith*, 308 U. S. 473;
*Griffith* v. *Helvering*, 308 U. S. 355;
*Bowers* v. *Kerbaugh Empire Co.*, 271 U. S. 170;

and see

*Southern Pac. Co.* v. *Lowe*, 247 U. S. 330;
*United States* v. *Phellis*, 257 U. S. 156;
*Gulf Oil Corp.* v. *Lewellyn*, 248 U. S. 71;
*Eisner* v. *Macomber*, 252 U. S. 189.

It is not contended that the facts in these cases are the same as in the case at bar, but it is contended that the principle announced by them as herein stated is directly and inevitably in conflict with the result reached by the United States Circuit Court of Appeals in the present case.

3. The decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeal involving the same principle. Particularly, it is in conflict with the following:

*Commissioner* v. *Dyer*, 74 F. (2d) 685 (C. C. A. 2nd);
*Foster* v. *Commissioner*, 96 F. (2d) 130 (C. C. A. 2nd);
*Schoenberg* v. *Commissioner*, 77 F. (2d) 446 (C. C. A. 8th);
*Commissioner* v. *Riggs*, 78 F. (2d) 1004 (C. C. A. 3rd);
*Commissioner* v. *Troup*, 75 F. (2d) 1010 (C. C. A. 7th);

and see

*Helvering* v. *Johnson*, 104 F. (2d) 140, 143 (C. C. A. 8th);
*Commissioner* v. *Neaves*, 81 F. (2d) 947, 949 (C. C. A. 9th).

All of these cases held that where property was sold and at the same time a similar amount of the same kind of property was purchased pursuant to a predetermined plan to maintain the taxpayer's position unaltered the substance of the transactions would be looked to rather than the narrow form in which the transactions were placed. In each of these cases it was, therefore, held that the sale would be disregarded and that the purchase and sale treated together would be considered as not altering the taxpayer's status. These cases involve losses claimed by the taxpayers, but in principle this could make no difference.

WHEREFORE petitioner respectfully prays, that the writ of certiorari be granted directed to the United States Cir-

cuit Court of Appeals of the Fifth Circuit to review the judgment herein referred to and that upon said review the judgment be reversed.

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